No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, *ET AL.*, *Petitioners*,

v.

NEW YORK, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, English First Foundation, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Inc., Family-PAC Federal, Conservative Legal Defense and Education Fund, Policy Analysis Center, The Senior Citizens League, and Restoring Liberty Action Committee in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United and Public Advocate of the United States and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, English First Foundation, Gun Owners Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Family-PAC Federal is a federal political action committee. Restoring Liberty Action Committee is an educational organization.

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* have filed *amicus* briefs in two cases involving the census power:

- Clinton v. Glavin, Brief *Amicus Curiae* of National Citizens Legal Network (a project of Citizens United Foundation), *et al.* in Support of

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Appellees (U.S. Supreme Court) (November 3, 1998); and

- Louisiana v. Bryson, Brief *Amicus Curiae* of U.S. Border Control Foundation, *et al.* in Support of Plaintiffs' Motion for Leave to File Bill of Complaint (U.S. Supreme Court) (January 13, 2012).

STATEMENT OF THE CASE

From the 1820 census until the 1950 Census (except 1840), the decennial census enumerators sought information about the citizenship of the individuals being counted. *See* New York v. Dep't of Commerce, 315 F. Supp. 3d 766, 776-77 (S.D. N.Y 2018) (App. 362a) (hereinafter "New York 2018"). The citizenship question was removed for the 1960 Census and has been absent since that time, despite the explosion of illegal immigration over the past decades. New York 2018 at 777-78 (App. 364a-365a).

The Fourteenth Amendment protected the right to vote for all male citizens who were at least 21 years old, and punished states who denied such right by reducing the apportionment of those states. *See* Fourteenth Amendment, § 2. Thus, the federal government used the first census after ratification (1870) of that amendment to evaluate whether the States were in compliance. New York 2018 at 777 (App. 363a).

People living in the United States on Census Day — April 1, 2020 — are to be counted at their usual

residence. Almost every category of person found in the United States on that day that can be envisioned are counted in the census, with the exception of persons who identify themselves as merely temporarily visiting the United States, such as on tourist visas. Although the website[2] of the Census Bureau is not clear, based on that source, it appears that all of the following categories of persons are counted in the Census:

- Diplomats representing foreign countries who are detailed to the United States, such as those who work at an embassy, consulate, United Nation's facility, or elsewhere;
- Citizens of foreign countries who are illegally in the United States;
- Citizens of foreign countries who are studying in the United States, such as on a student visa;
- Persons who have dual citizenship in the United States and another country, if they are usually resident in the United States;
- Citizens of foreign countries who are lawfully in the United States, such as those holding green cards;
- Persons born in the United States to parents who are illegal aliens (*i.e.*, "so-called birthright citizenship"); and
- Persons incarcerated, including felons who may not vote in federal elections.

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[2] *See* https://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html.

On February 27, 2017, the Senate confirmed Wilbur Ross as Secretary of Commerce who, two days later, was briefed on the 2020 Census. (New York v. Dep't of Commerce, 2019 U.S. Dist. LEXIS 6954, *117 (S.D. N.Y. Jan. 15, 2019) (App. 78a) (hereinafter "New York 2019"). Within a few days, Secretary Ross, in turn, inquired why there was no citizenship question on the census questionnaire. *Id.* at *117-*118 (App. 78a). Dissatisfied with the lack of progress confirming that such a question would appear on the 2020 Census questionnaire, Secretary Ross spoke with Kris Kobach, Kansas Secretary of State. *Id.* at *118-*119 (App. 78a-80a). The two secretaries, in turn, "discussed the potential effect on 'congressional apportionment' of adding 'one simple question' to the census." *Id.* at *119 (App. 80a). Over July and August 2017, "Secretary Ross and his staff continued to work internally, and with Kobach, to arrange for the addition of the citizenship question." *Id.* at *124 (App. 84a). On July 14, 2017, in follow-up to an earlier April 2017 conversation, Kobach emailed Secretary Ross, confirming "that the lack of a citizenship question on the census 'impairs the federal government's ability to do a number of things accurately,' and 'also leads to the problem that aliens who do not actually "reside" in the United States are still counted for congressional apportionment purposes.'" *Id.* at *125-*126 (App. 85a). Ten days later, Secretary Ross confirmed with Kobach "the addition of a citizenship question to the decennial census." *Id.* at *126-*127 (App. 85a-86a).

In the meantime, Census Bureau personnel resisted change and questioned the legality of placing a citizenship question on the 2020 Census

questionnaire. *See id.* at *128-*131 (App. 87a-89a). After weeks of indecision, Secretary Ross took "matters into his own hands by contacting Attorney General Sessions directly." *Id.* at *131 (App. 89a). On December 12, 2017, the Department of Justice issued a letter addressed to the Census Bureau requesting that a citizenship question be reinstated to assist with the assessment and enforcement of Section 2 of the Voting Rights Act ("VRA"). *Id.* at *134 (App. 91a). Even then, there ensued bureaucratic resistance both within and between the Commerce and Justice Departments. *See id.* at *139-*144 (App. 95a-99a). Nevertheless, on March 26, 2018, the Commerce Secretary exercised his authority to order the Census Bureau to add a United States citizenship question to the 2020 Census questionnaire, not for the purpose of assisting the enforcement of the VRA, but "for other reasons." *Id.* at *174 (App. 123a).

Thereafter, a group of 18 states, 15 cities and counties, the Conference of Mayors, and the District of Columbia filed suit in the U.S. District Court for the Southern District of New York, challenging the reinstatement of the citizenship question. A set of nongovernmental organizations led by the New York Immigration Coalition also filed suit in the Southern District of New York, and the cases were consolidated. (Additionally, four other lawsuits were filed in other districts around the country.)

On July 26, 2018, the district court denied in part the government's motion to dismiss, allowing the due process and Administrative Procedure Act ("APA") challenges to proceed. *See* New York 2018 at 811

(App. 434a). After an eight-day trial, on January 15, 2019, the district court "vacate[d] Secretary Ross's decision to add a citizenship question to the 2020 census questionnaire, [and] enjoin[ed] Defendants from implementing Secretary Ross's March 26, 2018 decision or from adding a question to the 2020 census questionnaire...." New York 2019 at *452 (App. 352a).

Plaintiffs in these cases sought discovery into the Secretary of Commerce's decision beyond the administrative record that was assembled pursuant to the APA. After the district court granted that motion for discovery, including a rare deposition of a Cabinet Secretary, the government sought a stay, which was denied, and then filed a petition for writ of mandamus to this Court to prevent the discovery outside of the administrative record. *See* Supreme Court Docket No. 18-557. This Court treated the petition for a writ of mandamus as a petition for writ of certiorari and granted it, but did not stay the district court proceedings. After briefing, the respondents in that case filed a motion to dismiss as improvidently granted in light of the district court's January 15, 2019 decision, and the case was removed from the argument calendar while the motion is pending.

After the January 15, 2019 district court decision, the government filed an appeal in the Second Circuit and also filed the petition for writ of certiorari before judgment presently under consideration. A motion to expedite was filed urging this Court to grant the petition and set an expedited briefing schedule that would permit the case to be decided by the end of June 2019, which is latest the Census Bureau can begin

printing the census questionnaires in time to begin the 2020 enumeration.

SUMMARY OF ARGUMENT

This case concerns the breadth of the power vested in Congress to govern "the manner" by which the Decennial Census provided for in Article 1, Section 2, clause 3, as amended by Section 2 of the Fourteenth Amendment. According to the district court below, the prescribed census "mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without." On that premise, the court found that the Secretary of Commerce, the cabinet officer of the executive department delegated by Congress to implement the 2020 Census, had no authority to include in the 2020 census questionnaire the simple question whether a person was a United States citizen. The court's premise is mistaken, and for that reason alone the court's ruling is erroneous and should be reversed.

The court's premise is based upon the wrong assumption that "persons," as that term appears in Article I, Section 2, clause 3 and in Section 2 of the Fourteenth Amendment, means every single human being found in the United States. Instead, the two provisions are designed to identify the number of inhabitants in each State to ensure that the representation of the States in the House of Representatives is proportionate to the populations of each State. They are not designed, as the court below

assumed, to count willy-nilly every single person in the United States regardless of whether that person is lawfully abiding in one of the States in the American republic. To the contrary, the two provisions are designed to secure the continuing sovereignty of the American People through their representatives elected by the people in proportion to their numbers State by State. To secure that federal goal, only those people who are part of the national community are to be counted in the decennial census.

While one need not be a citizen of the United States to be counted — such as an immigrant lawfully residing in one of the 50 States — does not mean that the question of one's citizenship is irrelevant to the decennial census. Rather, as documented by record below, from the earliest days of his tenure, the Commerce Secretary was advised that failure to include the citizenship question "leads to the problem that aliens who do not actually reside in the United States ... are still counted for congressional apportionment purposes." Indeed, a person who checks the box — no I am not a U.S. citizen — might very well not be a resident of the State that he claims to be. Having assumed that such a question is irrelevant, the court below dismissed the Secretary's decision to include a citizenship question pre-textual — not the real reason for his action — which in turn, led the court erroneously to conclude that the Secretary's action violated the APA.

In an effort to supplement his specious findings of APA violations, Judge Furman speculated that, if a citizenship question were asked, certain noncitizens

would not self-respond to the census at all. Judge Furman gave no weight to the fact that federal law absolutely bars the use of census data for purposes of immigration law enforcement. It is no surprise that every aspect of every Census is the subject of intense focus — indeed there is an academic cottage industry that second-guesses all that the Census Bureau does. However, the notion that a single federal district court judge in New York would take control of the Census from the Commerce Department, ordering it not to ask about U.S. Citizenship evidences some other agenda. A citizenship question may not be asked because some do not want the American people to know the true extent of illegal immigration, or the degree to which seats in the U.S. Congress, and votes in the Electoral College, are allocated based on the presence of illegal aliens.

Increasingly, the nation's long ruling elites embrace the utopian goal of Globalism, wishing to live in a post-nationalist world in which nation states and national citizenship simply do not matter. In that borderless world, American Citizenship would be ignored, not elevated. The change to add a Citizenship question to the Census by Secretary Ross was not supposed to happen. But President Trump was not supposed to be elected either. But elections have consequences, even when the "wrong" candidate wins. As is increasingly happening in Europe, the American people have rejected the internationalist of the nation's elites, believing that Citizenship does matter. The federal judiciary has no Constitutional warrant to suppress gathering of information that would let Americans know if allocation of political power in the

House of Representatives, and in the Electoral Congress, are now being allocated in a fraudulent manner under which American Citizens are under-represented, making them less able to resist the globalist policies of our ruling elites.

ARGUMENT

I. THE DISTRICT COURT GROUNDED ITS DECISION ON A FALSE ASSUMPTION THAT THE DECENNIAL CENSUS WAS PURPOSED TO COUNT EVERY INDIVIDUAL HUMAN BEING FOUND IN THE UNITED STATES.

A. The Law of the Decennial Census.

While District Judge Furman purported to exercise the Article III judicial power vested in him — to say what the law is[3] — the judge began his opinion by misstating the governing law of the Constitution. According to Judge Furman, by the express terms of Section 2 of the Fourteenth Amendment and Article I, Section 2, clause 3:

> the Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without. [New York 2019 at *26-*27 (App. 6a).]

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[3] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

But this is not what the two provisions, taken together, actually say. Rather, these constitutional provisions provide for a decennial census for the purpose of "apportion[ing] among the several states ... according to their respective Numbers," and thus vested Congress with the power to direct an "actual Enumeration" — counting "the whole Number of persons in each State, excluding Indians not taxed." Art. 1, Sec. 2, cl. 3 and Fourteenth Amendment, Sec. 2. To that end, Congress enacted the Census Act authorizing the Secretary of Commerce to "take a decennial census of population as of the first day of April of such year, [requiring] the tabulation of total population by States." Department of Commerce v. U.S. House of Representatives, 525 U.S. 316, 321 (1999). As Justice Joseph Story observed:

> [T]he enumeration or census of the **inhabitants** of the United States shall be taken ... in order to provide for new apportionments of representatives, according to the relative increase of the **population** of the States.... The importance of this provision ... can scarcely be overvalued. It is the only effectual means by which the relative power of the several States could be justly represented. [1 J. Story, Commentaries on the Constitution, Section 644, p. 471 (5th ed. 1891) (emphasis added).]

B. The Purpose of the Decennial Census.

Constrained both by (i) the purpose that representation of the States in the House of

Representatives be proportionate to the populations of each State, and (ii) the requirement to determine the numbers of persons State by State, the decennial census was not designed to count willy nilly "every single person residing in the United States" as Judge Furman has pictured. Rather, the constitutional text contemplates a count of the number of persons who constitute the "population" of each State. According to Judge Furman, a State's population for the purposes of proportionate representation in the U.S. House would include all those "living [in the United States] with legal status or without." New York 2019 at *27. Yet, this position disregards the central purpose of the decennial census, namely, to ensure that membership in the House of Representatives is based upon the principle of popular sovereignty that its members from each State would truly be "chosen every second year by the **People** of the several States." *See* Art. I., Sec. 2, cl. 1 (emphasis added).

James Madison aptly concluded in Federalist 52:

> As it is essential to liberty, that the government in general should have a common interest with the **people**; so it is particularly essential, that the branch ... should have an immediate dependence on, and an intimate sympathy with, the **people**. [The Federalist, No. 52, p.273 (G. Carey & J. McClellan, eds.: Liberty Press 2001) (emphasis added).

C. The "Persons" of the Decennial Census.

Thus, employed in the context of the constitutionally prescribed decennial census, "person," should be understood contextually — not abstractly as denoting just any human being, but relationally, with respect to the government as an "inhabitant" or "constituent." "Inhabitant" connotes a person who "dwells or resides permanently in a place,"[4] in contrast with one who is an occasional lodger or visitor. Surely the decennial census should not be counting a foreigner who is on a tourist visa who just happened to be on American soil on April 1, 2020. But the decennial census is designed to number "constituents," denoting that those persons who are an essential part of the political community, not a world traveler who happened to be living in one of the 50 States. Judge Furman envisions a census counting the lawful permanent resident and the trespasser alike — each to be counted as one of the population of his respective State and therefore, each to be counted in the apportionment of members of the House of Representatives for the next 10 years. This is not the kind of decennial census contemplated by the nation's founders. *See* J. Madison, Census Bill, House of Representatives 25-26, Jan.-Feb. 1790, reprinted in 2 The Founder's Constitution; item 19, p. 139, P. Kurland & R. Lerner (Univ. Chi. 1987).

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[4] Webster's Dictionary of 1828.

D. The People in the Decennial Census.

Indeed, the language in the Fourteenth Amendment quoted by the district court cannot be viewed in isolation, but must be viewed in the context of the original constitutional text to determine if a substantive change was intended by the one word on which the district court built its entire opinion — that Amendment's use of the word "persons." Immediately after vesting "[a]ll legislative power in a Congress..." the Constitution of 1789 establishes that:

> The House of Representatives shall be composed of members **chosen** every second year **by the People**[5] of the several states.... [Art. I, Sec. 2, cl. 1 (emphasis added).]

As Chief Justice William Rehnquist explained as recently as 1990:

> **"[T]he people"** seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "**the People** of the United States." The

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[5] Indeed, the district court never even mentioned that under current federal law, it is illegal for non-citizens to vote in elections for House of Representatives. *See* 18 U.S.C. § 611. However, under the district court's view, seats in the House of Representatives would be allocated to states based on a count not only of persons lawfully in the United States but ineligible to vote, but also all those here in defiance of our nation's laws, rather than being "subject to the jurisdiction thereof." *See* Fourteenth Amendment, Sec. 1.

> Second Amendment protects "the right of **the People** to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved by "**the people**." See also U.S. Const., Amdt. 1 ("Congress shall make no law ... abridging ... *the right of* ***the people*** peaceably to assemble") (emphasis added).... [United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (emphasis added).]

Then, turning to the composition of the House, the Chief Justice addressed Art. I, Sec. 2, cl. 1, again italicizing the key words: "The House of Representatives shall be composed of Members chosen every second year *by* ***the People*** *of the several States* (emphasis added)" (*id.*). Based on all this, Chief Justice Rehnquist concluded:

> While this textual exegesis is by no means conclusive, it suggests that "**the people**" ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. [*Id.* (emphasis added).]

And to clarify who would not be part of that community, the Chief Justice cited United States *ex. rel.* Turner v. Williams, 194 U.S. 279, 292 (1904), for the proposition that:

> (Excludable alien is not entitled to First Amendment rights, because "he does not

> become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"). The language of [the First, Second, Ninth, and Tenth] Amendments contrasts with the words "person" and "accused" in the Fifth and Sixth Amendments.... [Verdugo-Urquidez at 265-266.]

The Chief Justice's analysis echoed James Madison:

> As it is essentia[1] to liberty, that the government in general should have a common interest with **the people**, so it is particularly essential, that the branch of it under consideration [the House of Representatives] should have an immediate dependence on and an intimate sympathy with **the people**. [The Federalist, No. 52, p. 273 (G. Carey & J. McClellan eds., Liberty Press 2001) (emphasis added).]

E. The Nation's Citizenry and the Decennial Census.

The Fourteenth Amendment did not denigrate the concept of citizenship, but rather was designed to clarify entitlement to national and state citizenship of the former slave class. It is a serious mistake to assume, as the district court did, that, solely based on the single use of the word "persons," Congress and the ratifying states intended to apportion House seats by a count of all persons, rather than a count of "the

People." Indeed, even following the ratification of the Fourteenth Amendment, the 1870 census asked about the citizenship of each respondent, as well as whether the respondent's parents were foreign born, and also inquired whether the respondent was a male citizen of the United States 21 years old and older "whose right to vote is denied or abridged on other grounds than rebellion or other crime." *Id.*

Compounding the district court's erroneous assumption that a person's legal status is irrelevant in conducting the decennial census, is its assertion that citizenry is also completely irrelevant to the question whether one may be counted — presence in the United States is enough. Again, the court is mistaken.

According to Section 1 of the Fourteenth Amendment, United States citizenship begets citizenship in the State in which a citizen resides. If one is not a U.S. citizen, there is no way for that person to claim State citizenship in the State in which he resides. In conducting the decennial census, a Secretary of Commerce might very well include a question whether a person who claims state residency — but who answers "no" to a question whether he is a U.S. citizen — might very well not be the resident of the State that he claims to be. Indeed, that concern appears to have been a major consideration of Secretary Ross, as documented by Judge Furman:

> Throughout July and August 2017, Secretary Ross and his staff continued to work internally and with [Kansas Secretary of State Kris]

> Kobach, to arrange for the addition of the citizenship question.
> On July 14, 2017, Kobach emailed Secretary Ross to follow up on their April telephone conversation.... Kobach wrote that the lack of a citizenship question on the census "impairs the federal government's ability to do a number of things accurately," and "also leads to the problem that aliens who do **not** actually '**reside**' in the United States ... are still counted for congressional apportionment purposes." [New York 2019 at *125-*126 (App. 84a-85a) (emphasis added).]

Having simply assumed generally that there was no constitutional significance to obtaining a count of the number of citizens, and indeed giving the impression that there was no real significance to citizenship at all, the district court gave the matter no further consideration and then proceeded to conclude selectively that the decision by the Secretary of Commerce to do so in the 2020 Census would violate the Administrative Procedure Act. (*See* discussion in Section II, *infra*.) Had the district judge paused to consider the constitutional purpose of a census, he might have been less hostile to the Administration's plan to count the number of citizens.

II. THE DISTRICT COURT'S VIEW THAT THE SECRETARY'S DECISION TO ASK A CITIZENSHIP QUESTION VIOLATED THE ADMINISTRATIVE PROCEDURE ACT IS BOTH BIZARRE AND UNCONVINCING.

Spurred by an unmitigated zeal to uncover the "real reasons" for President Trump's new Secretary of Commerce's action "reinstating the citizenship question on the 2020 census questionnaire," the district court concluded:

> that Secretary Ross's stated rationale, to promoted [V]oting [R]ights [A]ct was pretextual — in other words, that he announced his decision **in a manner** that **concealed its true basis** rather than explaining it, as the APA required him to do. [New York 2019 at *32-*33 (App. 10a) (emphasis added).]

What that specific pretext was, Judge Furman could not say. But he did confess that "although the Court finds that Secretary Ross's decision *was* pretextual, it is unable to find, on the record before it, that the decision was a pretext for impermissible discrimination" (*id.* at *33 (App. 11a)), even though the specific complaint before him was a claim that the Secretary was "motivated in part by invidious discrimination against immigrant communities of color." *Id.* at *29 (App. 8a).

Unable then to find a constitutional violation, Judge Furman turned to the APA, finding a "veritable

smorgasbord of classic, clear-cut ... violations" (New York 2019 at *32 (App. 10a)). But, as detailed in the government's Petition for a Writ of Certiorari Before Judgment, Judge Furman's banqueting table was festooned with first-of-their-kind findings, unaddressed by any previous court, including "the first time the judiciary has ever dictated the contents of the decennial census questionnaire." *Id.* ("Pet.") at 14-16.

Undaunted, Judge Furman justified his, "to put it mildly, long" opinion, "tak[ing] care to thoroughly examine **every issue** because the integrity of the census is a matter of **national importance**[,] occur[ing] only once a decade, with no possibility of a do-over if it turns out to be flawed." New York 2019 at *34-*35 (App. 11a) (emphasis added). It is not, Judge Furman opined, that "an agency cannot adopt new policies or otherwise change course, [b]ut the APA does require that before an agency does so, it must consider all important aspects of a problem, study the relevant evidence and arrive at a decision rationally supporting by that evidence and substantive laws; and articulate the facts and reasons — the *real* reasons — for that decision." *Id.* at *37 (App 13a-14a). As it turns out, however, Judge Furman's findings of APA violations are by his own admission — pretextual — marshaled to rid the 2020 census of the Commerce Secretary's citizenship question purportedly on the grounds that the Secretary "violated the law," whereas the **real reason** was that, in the eye of the judge: the "Secretary violated the public trust." *Id.* at *37-*38 (App 14a).

Foremost, among the numerous findings that the Secretary's action adding the citizenship question violated the APA, is Judge Furman's finding that the Secretary most blatantly "violated, a statute that requires him, in circumstances like those here, to collect data through the acquisition and use of 'administrative records' *instead* of through 'direct inquiries' on a survey such as the census." New York 2019 at *32 (App. 10a). According to Judge Furman, posing the citizenship question to each respondent whether he is a U.S. citizen, violated Section 6(c) of the Census Act which forbids the Secretary from seeking such information by "direct inquir[y]" of individual respondents instead of by reliance on administrative records of government agencies. *Id.* at *347-*362 (App. 259a-272a).

Conspicuously missing from the judge's analysis is whether Section 6(c) is even relevant to the citizenship questionnaire. As Judge Furman acknowledges, the rule limiting one-on-one inquiries was adopted by Congress to "direct the Secretary of Commerce to acquire and use to the greatest extent possible statistical data from other sources in lieu of making direct inquiries." *Id.* at *352 (App. 264a). Additionally, and decidedly, Judge Furman admits that Congress excepted from this mandate any inquiry the purpose of which concerned "apportionment in the House of Representatives." *Id.*

To be sure, Judge Furman attempted to support his case that Section 6(c) applies because the citizenship question, as applied to the VRA, was designed to generate data to more effectually enforce

that Act. But Judge Furman made no effort to square that explanation with his finding that the Secretary's "stated rationale, to promote VRA enforcement was pretextual — in other words, that he announced his decision in a manner that concealed its true basis..." *Id.* at*32-*33 (App. 10a). The judge cannot have it both ways.

Also singled out for special emphasis is Judge Furman's holding that the Secretary violated a "statute requiring him to notify Congress of the subjects planned for any census at three years in advance." *Id.* at *32. Devoting pages *364 to *374 to this ruling, Judge Furman labored diligently to find case support for his unprecedented conclusion that "compliance with the requirements in 13 U.S.C. § 141(f) for reports by the Secretary of Commerce to Congress about the census is judicially reviewable," much less whether Section 141(f) reports that were submitted to Congress violated that Section. *See* Cert. Pet. at 15 and 25. Indeed, all that Judge Furman offered was to nitpick the substantive contents of the reports (New York 2019 at *364-*366 (App. 274a-276a)), and to critique the case precedents cited by the government in support of its argument that the "adequacy" of the reports was not judicially reviewable. *See id.* at *366-*374 (App. 276a-284a).

Yet Judge Furman admitted that "[t]he statute is **plainly** intended to facilitate **Congress's oversight** of the Secretary, thereby enabling the **legislature** to fulfill its 'constitutional duty ... to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and the

laws of the United States." *Id.* at *363-*364 (App. 273a) (emphasis added). Indeed, the Section 141 text, itself, calls for a three-step process wherein the Secretary of Commerce is commanded to submit its three reports to all of "the committees of Congress having legislative jurisdiction over the census," leaving to the Secretary's broad powers to "determin[e]" (i) in the first report, three years out, "the subjects proposed to be included, and the types of information to be compiled, in such census"; (ii) in the second report (two years out) "the questions proposed to be included;" and (iii) in the third report, if "necessary" "the subjects, types of information or questions as proposed to be modified." *See* New York 2019 at *363 (App. 273a).

Instead of deferring to Congress to exercise oversight, Judge Furman jumped in, ruling that Section 141(f) was violated because it was "flat wrong" for the Secretary to have stated that a citizenship question had been included in the 2010, and that it was "materially misleading" for the Secretary to have implied that the citizenship question had been asked of every household in 1960 and thereafter." *Id.* As Justice Story observed in his Commentaries on the Constitution: "Nothing can be more fallacious than to found political calculations on arithmetical principles." 1 Story at sec. 652, p. 475.

III. THE DISTRICT COURT'S HYPER-TECHNICAL OBJECTIONS TO A SIMPLE CITIZENSHIP QUESTION ENVISIONS A GLOBALIST WORLD WITHOUT NATIONAL BORDERS.

In addition to the purported violations of the Administrative Procedure Act discussed in Section II, *supra*, Judge Furman claimed the "evidence clearly shows, and certainly shows by a preponderance of the evidence, that the citizenship question will cause a significant differential decline in self-response rates among noncitizen households." New York 2019 at *208 (App. 150a). Based on projections by so-called "experts," he concluded that the citizenship question will result in "an incremental net differential decline in self-responses among noncitizen households of at least 5.8%" and "could be much higher." *Id.* Thus, all of the findings of harm to the plaintiffs establishing standing was based on speculation about lower self-response rates primarily by noncitizens and also by citizens who theoretically might not respond "out of fear that a family member could be deported." *Id.* at *204 (App. 146a). Interestingly, Judge Furman gave no weight to the fact that federal law absolutely prevents the Census Bureau from using "the information furnished ... for any purpose other than the statistical purposes for which it is supplied..." 13 U.S.C. § 9(a)(1).[6]

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[6] An analysis by the Brennan Center for Justice reports that it is "crystal clear" that census information may not "be used by law enforcement agencies to track down undocumented immigrants or those suspected of some crime...." Its analysis concludes, "your

Matters of response rate and the technical problems associated with conducting the Census are legion. Conflict among alternative methodologies, and conflicting speculation concerning the effect of any and every change contemplated, abounds in the social science literature. For example, one of the intractable problems is that of an "overcount" (*i.e.*, duplicate count) of certain categories persons. *See, e.g.*, National Research Council, Coverage Measurement in the 2010 Census (Nat'l Academies Press: 2008) ("Prior to 1990 the main coverage problem was census omissions, but at the national level in 2000 the number of erroneous enumerations was roughly the same as the number of census omissions." *Id.* at 8). *See also* Harvey Choldin, Looking for the Last Percent: The Controversy over Census Undercounts (Rutgers U. Press: 1994). It is unlikely that perfection will ever be achieved in conducting a national count of the American People, and no doubt efforts to improve the count will continue as long as there is an American Republic.

Thus, at one level, the basis for Judge Furman's decision is sheer speculation about a hyper-technical issue as to the effect of making one short addition to the Census questionnaire. At another level, a policy level, this legal challenge to that question brought by Democrat-led states, cities, counties. and nonprofit organizations could well be seen as an effort to ensure that data is never generated which could be used to allocate the House of Representatives based on

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census responses can't be used to harm you." Mireya Navarro, "This is How the Federal Government Can — and Can't — Use Census Information," The Brennan Center (Feb. 20, 2019).

American citizenship. And more immediately, it is an effort to protect the extra House seats allocated under current rules to reliably blue states such as California and New York. Judge Furman explained census data as being critical to "draw political districts and allocate power within them" and "to allocate hundreds of billions of dollars in federal, state, and local funds." New York 2019 at *27. Thus, the challenge is truly about preserving power for politicians who cater to illegal aliens, and preserving money for welfare benefits paid to subsidize those illegal aliens,[7] and to grow the profits of the businesses and elites of those who profit from their presence.

A study by the Congressional Research Service in 2015 demonstrated the concluded:

> [i]f the citizen population had been the basis of apportioning the seats in the House of Representatives after the 2000 census, it was estimated that nine seats would have shifted among 13 states relative to the actual apportionment. California would have received six fewer Representatives than it actually did. [Royce Crocker, "Apportioning Seats in the U.S. House of Representatives Using the 2014 Estimated Citizen Population," Congressional Research Service (Oct. 30, 2015).]

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[7] "More than half of the nation's immigrants receive some kind of government welfare, a figure that's far higher than the native-born population[]...." Alan Gomez, "Report" More than half of immigrants on welfare," USA Today (Sept. 2, 2015).

Additionally, and not addressed by Judge Furman, is another goal implicit in the challenge by certain states. Allocating seats in the House of Representatives based on a count that includes illegal aliens also affects the Electoral College, which is composed of a "Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...." Art. II, Sec. I, cl. 2. Thus, shifting House seats to states with large numbers of illegal aliens could shift enough votes in the Electoral College to alter the outcome of an election for President of the United States.

Appellee's challenge, and Judge Furman's opinion, appear to be predicated on the notion that America's dual citizenship is so unimportant to their vision of how the nation should operate, and how Americans should be represented in Congress. Thus, the judge would not allow even a speculative risk of undercounting persons illegally in the United States to count those with citizenship.

The election of Donald J. Trump as President of the United States struck a blow to the intellectual and political establishment which has long dominated American politics. President Trump was not supposed to win. The established order was supposed to continue in power beyond January 2017 as it had been in power in the past. The policies put in place over decades were to continued. It is beyond dispute that the established order was distinctly globalist in orientation, whether on matters of finance, trade, immigration, military intervention, multi-national relations, law, or most any other important public

policy issue. The globalist dream was to see the nation state destined to be relegated to the dustbin of history. Following the lead of Europe the notion of citizenship in a particular European country was to be virtually irrelevant in a more global European Union. The political effect of the European global experiment, however, was to separate even further the people from those who seek to rule them, and thereby to render a nation's citizenry almost completely unable to affect the policies by which they are governed, ceding sovereignty to bureaucrats and elites possessing great wealth.

That view was rejected in the United Kingdom with the unexpected result of the Brexit vote of June 12, 2016. And then on November 8, 2016, a President who embraced the view that the American government should put the interests of Americans first was elected precisely because he reflected the view of most ordinary Americans. And based on the "yellow vest" movement in France, and numerous other developments, it is clear that globalism is on the defense and the nation state is on the rise.

The established order has certainly not yielded to the will of the American people. The established order's representatives in Media, Congress, Academia, Hollywood, Wall Street, and Silicon Valley had long derided President Trump in the pejorative as a "nationalist." However, not one to back away from a fight, President Trump doubled down and embraced the term "nationalist" at a speech in Texas in October 2018, saying: "Really? We're not supposed to use that word. You Know what I am? I'm a nationalist. OK?

I'm a nationalist."[8] Globalists promise improvements for the common man, but their policies generally only profit the elites. It is generally predicated on the religion of secular humanism, rejecting God's ordained system set out in Acts 17[9] designed to avoid the self-destructive one-world folly of the Tower of Babel.[10] Globalists do not want nations to have borders, to say nothing of walls. Speaker of the House Nancy Pelosi calls border walls "immoral"[11] even while it is estimated that just this month "100,000 or more" persons will attempt to enter the country illegally

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[8] Q. Forgey, "Trump: 'I'm a nationalist,'" Politico.com (Oct. 22, 2018).

[9] *See* Acts 17:26-27. "And hath made of one blood all nations of men for to dwell on all the face of the earth, and hath determined the times before appointed, and the bounds of their habitation; That they should seek the Lord, if haply they might feel after him, and find him, though he be not far from every one of us...."

[10] *See* Genesis 11:1-9. "And the Lord came down to see the city and the tower, which the children of men builded. And the Lord said, Behold, the people is one, and they have all one language; and this they begin to do: and now nothing will be restrained from them, which they have imagined to do. Go to, let us go down, and there **confound their language**, that they may not understand one another's speech. So the Lord **scattered them abroad** from thence upon the face of all the earth: and they left off to build the city. Therefore is the name of it called Babel; because the Lord did there confound the language of all the earth: and from thence did the Lord scatter them abroad upon the face of all the earth." (Emphasis added.)

[11] *See* S.A. Miller & David Sherfinski, "Split over Nancy Pelosi's 'immorality' comment on border wall reveals fissure in Democratic Party," The Washington Times (Jan. 17, 2019).

through our Southern Border.[12] At odds with the nation's structure, an increasing minority of voters supports allowing illegal aliens to vote.[13] Some support Open Borders, rejecting the very notion of the nation state.[14]

Those who embrace globalism and reject nationalism are increasingly clear about their objectives. *See, e.g.*, Maurice Roche, Rethinking Citizenship: Welfare, Ideology and Change in Modern Society (Polity Press: 1992) (Analyzing what the author calls "legal," "political," and "welfare" citizenship, as well as the "growing forces of globalization in the contemporary capitalistic order." *Id.* at 191); Rinku Sen, The Accidental American: Immigration and Citizenship in the Age of Globalization (Berrett-Koehler: 2008) ("Taking the alternative path will also require us to remove the stigma of illegality from those who are here now so that we can incorporate them into American society and moving on to crafting the kinds of globalization

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[12] Nick Miroff, "Record number of families, cold reality at border" *Washington Post* (Mar. 4, 2019).

[13] A 2015 poll by Rasmussen Reports, 35 percent of likely voters responded that illegal aliens in the United States should be given the right to vote as long as they pay taxes. "Most Democrats Think Illegal Immigrants Should Vote," Rasmussen Reports (May 29, 2015).

[14] M. Krikorian, "Yes, the Democrats Are for Open Borders," Center for Immigration Studies (Nov. 27, 2018).

policies that improve life for regular people all over the world.").[15]

Globalization may be sought by many of our nation's elites, but it is not the formula adopted by the framers. Our Constitution's Preamble reminds us that it was "We the people" who united together to establish the Constitution in order to "secure the Blessings of Liberty" — not the act of citizens of the world to create a global community. James Madison cautioned us in Federalist 52 that it was absolutely "essential to liberty" to keep the "intimate" connection between the House of Representatives and American people," which requires distinguishing between those who are citizens members of the polity and those who are not.

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[15] A review of the social science literature of those considered to be "experts" in transnational citizenship can be a mind-numbing experience. *See, e.g.*, Michael Peter Smith & Matt Bakker, Citizenship across Borders: The Political Transnationalism of *El Migrante* (Cornell Univ: 2008) ("In this book we draw extensively on five years of community-based ethnography on the practices of U.S.-Mexican transnational citizenship, while expanding the space of community to encompass the multiple cross-border locations in which our ethnographic subjects are orchestrating their political lives transnationally.").

CONCLUSION

For the reasons stated above, the decision of the lower court should be reversed and the injunction lifted.

Respectfully submitted,

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March 6, 2019